NO. 80-53 1

IN THE

Supreme Court of the United States

October Term, 1980

BERENICE T. SCHNEIDER,

Petitioner.

vs.

THOMAS D. BOWES, BOWES MANAGEMENT CO., BOWES-ELGIN REALTY CO., BOWES-DUNDEE REALTY COMPANY and ROBERT J. CAMPBELL,

Respondents.

RESPONDENT ROBERT J. CAMPBELL'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[1]The United States Court of Appeals for the Ninth Circuit reversed a $40,000 judgment against Kenneth G. Braid, a defendant-appellant below, finding that there was no evidence to support the verdict.

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RESPONDENT ROBERT J. CAMPBELL'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Plaintiff, petitioner in this action, sued sixteen defendants alleging facts and circumstances surrounding nine different business transactions, each of which transaction involved several of the defendants.

After a trial of approximately five weeks, the jury found for plaintiff and against six defendants (the six remaining).

Defendants appealed the decision of the trial court to the United States Court of Appeals for the Ninth Circuit. At the time of oral argument the justices of the appellate court freely questioned counsel regarding the facts and issues of the case, making it abundantly clear that the court was thoroughly familiar with the briefs which counsel had filed as well as with the court reporter's transcript (in excess of 3,000 pages).

The appellate court reversed the $40,000 judgment against Kenneth G. Braid, finding that there was no evidence to support the verdict.

The appellate court found the jury verdict hopelessly ambiguous, reversed judgment against respondents, and granted a new trial.

In granting the new trial the appellate court noted, "We recognize that a jury verdict should stand whenever any reasonable interpretation of the record will support it, but under the peculiar facts of this case, we find no such interpretation and are therefore constrained to reverse."

On appeal the issue of "invited error" was briefed, argued, and obviously rejected by the appellate court.

Petitioner now brings on this petition for a writ of certiorari to again raise the issue of invited error.

SUMMARY OF ARGUMENT

Petitioner argues that there was "invited error" as to the jury verdict in that respondents objected to plaintiff's efforts to seek clarification of the jury verdict. A reading of the record (TOI 57, 58), a copy of which is attached hereto as Exhibit A, clearly shows no such objections (in fact, counsel for respondent sought clarification of the verdict, which request was denied by the trial court).

Petitioner also asserts that there is "a conflict between the circuits," but a reading of the case from the Eighth Circuit Court of Appeals shows that it is in concert with the instant case and, thus, no conflict exists.

ARGUMENT

1. There was no invited error as to the jury verdict.

Petitioner asserts that after the jury returned its verdict defense counsel opposed plaintiff's efforts to clarify the verdict. It is respectfully submitted that the petitioner misstates the record. A reading of the petitioner's reference to TOI 57, 58 (Exhibit A attached) shows that it was counsel for respondent Robert J. Campbell who made the first effort to clarify the verdict. The trial judge denied

both this request as well as the subsequent request of plaintiff for clarification. Immediately after the court's denial of the efforts to clarify the verdict plaintiff requested to be excused to interrogate the jury. This request was also denied by the trial court.

Contrary to petitioner's interpretation of the record, respondent made no objection to petitioner's attempt to clarify the jury verdict.

It is submitted from the foregoing that there was no invited error.

2. Petitioner's authorities do not support the theory of "a conflict between the circuits."

Petitioner's theory that there is a conflict between the circuits is not supported by a close reading of the cases.

Petitioner first cites the case of *Hudson v. Wylie* (9th Cir. 1957), 242 F.2d 435, a bankruptcy case, where the issue allegedly in point is concerned with the erroneous exclusion of key evidence on motion of appellant. Appellant seeks to assign this exclusion as reversible error but fails. Clearly, the issues in *Hudson* do not deal with ambiguities in verdicts or, as alleged by petitioner, respondents' objections to petitioner's inquiries: thus, *Hudson* is not in point with the instant case.

Petitioner next cites the case of *Arnott v. American Oil Co.* (8th Cir. 1979), 609 F.2d 873, but this case also does not deal with the issue of "invited error." In *Arnott* the jury awarded Arnott $100,000 in general damages. One of the causes of action alleged a violation of the anti-

trust laws and based thereupon the trial court trebled the damages. On appeal appellant alleged that the verdict was ambiguous. The appellate court, after discussing waiver and estoppel, agreed in part with appellant and concluded that since there was a general verdict and it was impossible to tell if the jury meant to include or exclude the anti-trust cause of action, then the trial court should not have trebled the damages. The appellate court affirmed the verdict on condition that a remittitur (of all in excess of $100,000) be filed. It is clear from a reading of the case that if appellee did not file the remittitur, then a new trial would be granted.

In *Arnott* the verdict was found to be ambiguous and could only be saved by remittitur. In the instant case the verdict was found to be "hopelessly ambiguous" and could not be saved. It is submitted that there is nothing to clarify between the decision of the Eighth Circuit in *Arnott* and the case presently before this Court.

The last case which petitioner cites is *Brown v. Regan* (1938), 10 Cal. 2d 519, a case decided by the California Supreme Court. It is not clear how *Brown* is relevant to the issue of "a conflict between the circuits," but *Brown* is also distinguishable from the within case.

In *Brown,* a personal injury suit relating to a car accident, the jury brought back a verdict of "nothing dollars" against the driver and $1,000 against the owner of the car. The appellate court noted that "the proper procedure where an informal or insufficient verdict has been returned is for the trial court to require the jury to return for further deliberation." In *Brown* the attorney for the owner vigorously opposed efforts of plaintiff's

attorney to seek clarification and, based thereupon, it was found that the owner was to be liable for the $1,000.

Brown is clearly not in point with the instant case as there is no showing whatsoever in the instant case that respondent objected to clarification of the jury verdict.

CONCLUSION

From the foregoing it is clear that the holding of the Eighth Circuit Court of Appeals and the case before this Court are in concert and, thus, there is no conflict between the circuits.

In addition, petitioner has been less than forthright with the Court in that a plain reading of the post-verdict transcript indicates that respondent's counsel sought a clarification of the jury verdict and that, contrary to petitioner's representations, there were no objections by respondents or any other defendants to petitioner's attempt to clarify the jury verdict.

It is submitted that the petition for writ of certiorari is frivolous and without any merit whatsoever and should be denied and that respondent should recover costs, including reasonable attorney's fees for opposing the petition.

Respectfully submitted,

JOSEPH E. STALDER

Attorney for Respondent
Robert J. Campbell

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[TOI 57]

Thank you very much for the time and attention that you have given this matter.

MR. CONDRA: Your Honor --

MR. STALDER: Your Honor, may I inquire, though, as to what time frame the damages were to be established in? In other words, as against Mr. Campbell, for instance, whether or not the damages were assessed for the time period prior to July 26, 1973?

THE COURT: No, that wasn't on the verdicts. I think the verdicts speak for themselves.

THE CLERK: Your Honor, are the judgments to be prepared by Plaintiff?

MR. ELSTER: Your Honor, may I inquire as to the one special interrogatory requested the Court give before the verdict that they now be requested at this point as to the total damages the jury found?

THE COURT: I don't understand you.

MR. ELSTER: The one that I submitted to Your Honor this morning.

THE COURT: I can't read it. What was it?

MR. ELSTER: May I present it to Your Honor?

THE COURT: I can't submit a verdict after a case is gone to the jury.

MR. ELSTER: It was only as to the total damages, Your Honor.

[TOI 58]

MR. CONDRA: The Court answered counsels inquiry in Chambers this morning.

THE COURT: Do you have an adding machine? We can add these up as to the interest. Interest is denied.

Very well.

You are excused until further notice.

(Jury panel excused.)

(The following proceedings commenced out of the presence of the jury.)

MR. ELSTER: Your Honor, may I be excused to see if any of the jurors wish to discuss this with me?

THE COURT: No, sir. That's a rule of this Court, that counsel cannot interrogate the jurors.

MR. ELSTER: I didn't mean to interrogate them, if any of them wanted to discuss it.

THE COURT: Or what went on in the jury room. That is Rule 23 of this Court.

MR. ELSTER: I didn't know that.

On the issues of preparation of the judgment --

THE COURT: I usually draw them myself. I will draw them and file them. I won't do it until I get home.

I think we will finish this other case by noon tomorrow. If you have any motions you want to make tomorrow

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on OCTOBER , 1980, I served the within RESPONDENT ROBERT J. CAMPBELL'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Schneider v. Bowes) on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

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Thomas D. Bowes, et al.

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Attorney for Plaintiff/Petitioner

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCTOBER 28, 1980, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

41 Copies to United States Supreme Court, Washington, D. C.

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